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Nos. 94-1893 and 94-1900

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA, *et al.*

and

NATIONAL CABLE TELEVISION ASSOCIATION, *et al.*,
Petitioners,

v.

BELL ATLANTIC CORPORATION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The California Cable Television Association ("CCTA") submits this brief as *amicus curiae* in support of petitioners.[1]

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[1] Consistent with S. Ct. R. 37.3, all parties have given CCTA their consent to the filing of this brief. Two members of CCTA, Time Warner Cable and Home Box Office, are not represented by CCTA for purposes of this action.

CCTA is a trade association representing cable television system operators that provide cable television service to nearly six million California residents, as well as cable television programmers and equipment suppliers. CCTA brings information to the Court concerning the effect elimination of the in-region bar on telephone company provision of video programming has had, and will continue to have, on cable television operators and consumers in California. CCTA has unique knowledge of the incentive and ability of local exchange carriers ("LECs") in California—specifically, Pacific Bell ("Pacific") and GTE Corporation—to engage in anticompetitive behavior in a manner that directly affects the ability of cable operators to compete effectively in the marketplace. Notably, this anticompetitive conduct is at the heart of the congressional justification for Section 533(b) of the Communications Act.

Since 1958, CCTA has participated in proceedings before a wide range of administrative, legislative, and judicial bodies on behalf of the cable television industry in California and its individual members. CCTA has a wide range of experience advocating the rights of cable television operators before this Court [2] and before the Court of Appeals for the Ninth Circuit.[3] Most recent and relevant to the questions posed by the petitioners for certiorari, CCTA filed a brief as intervenor-applicant in the Ninth Circuit Court of Appeals when the district court

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[2] See *amicus* briefs filed by CCTA in *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994) and *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438 (1991).

[3] CCTA has filed *amicus* briefs in *Preferred Communications, Inc. v. City of Los Angeles, California, and Department of Water and Power*, 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986); and *Preferred Communications, Inc. v. City of Los Angeles, California, and Department of Water and Power*, 13 F.2d 1327 (9th Cir. 1994), *cert. denied*, 114 S. Ct. 2738 (1994).

invalidated the telephone company-cable operator cross-ownership ban at issue in this case.[4]

This *amicus* brief will illustrate that the issues the petitioners ask this Court to resolve will have a substantial impact on competition in the provision of multichannel video programming, the video services market, and the market for local telephone competition as well.[5]

REASONS FOR GRANTING THE PETITION

The central issue in this case is whether a non-content based regulation, which the court of appeals found promotes the significant governmental interest in media outlet diversity and deterrence of anticompetitive behavior,[6] violates the First Amendment because there might be less burdensome alternatives, without regard to how effective such alternatives might be at accomplishing the governmental interest.

To find, as the court of appeals did, that the telephone company-cable television cross-ownership ban was not narrowly tailored enough to pass constitutional muster[7]

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[4] See Brief of CCTA in *U S West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1994). The court of appeals ultimately denied CCTA intervenor status in that case and, thus, CCTA participated as *amicus curiae*. CCTA, however, participated in joint oral argument of the *U S West* case in its capacity as an intervenor in *Pacific Telesis Group v. United States*, 48 F.3d 1106 (9th Cir. 1994), *rehearing pending*, which also involved a constitutional challenge to Section 533(b). In addition, CCTA was a party in *GTE California, Inc. v. FCC*, 39 F.3d 940 (1994).

[5] In the alternative to this Court's review, CCTA supports the petitioners' request that the decision of the court of appeals be vacated and remanded for further consideration in light of the FCC's action in *Telephone Company-Cable Television Cross-Ownership Rule, Sections 63.54-63.58, Third Report and Order*, FCC 95-203 (released May 16, 1995).

[6] Pet. App. 34a.

[7] Pet. App. 42a.

flies in the face of the "real life" experience CCTA's members have had with anticompetitive conduct by California's LECs. The simplistic assumption that other less burdensome options exist, or that the Federal Communications Commission ("FCC") has the requisite means to enforce conduct-specific regulation, fails to take into account the overwhelming incentive and ability of telephone companies to use their monoply power to cross-subsidize and discriminate against competitors in the video services market.

The cross-ownership ban was first adopted by the FCC in 1970 to address the problem of discrimination against cable companies unaffiliated with LECs and to avoid the extension of the telephone company monopoly into the cable services market.[8] The FCC concluded that "the preservation of . . . competition will best be assured by the exclusion of telephone companies in their service areas from engaging in the sale of [cable] service to the viewing public." [9]

In 1981, the FCC revisited this subject with the issuance of a comprehensive staff report on the agency's cable cross-ownership policies.[10] While the report noted that the cable industry no longer was in its infancy, it concluded that continued prohibition of telephone company-cable television cross-ownership "remains essential." [11] It stated that the restriction should not be lifted until the potential of cable television operators to become genuine competitors of telephone companies with respect

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[8] See 47 C.F.R. 64.601 (1971); *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C.2d 307 (1970), aff'd *sub nom. General Tel. Co. of Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971).

[9] 21 F.C.C.2d at 325.

[10] FCC Office of Plans and Policy, *FCC Policy on Cable Ownership, A Staff Report* (Nov. 1981).

[11] *Id.* at 177. *See also id.* at 143 (restriction "must be retained for the time being.").

to local telephone service became more realistic. The report observed that independent cable operators offered the potential "to constrain telephone company market power" and "long run prospects for eliminating the 'local bottleneck' altogether." [12] Thus, the FCC explained, the decision of whether to lift the cross-ownership ban "depends critically on the nature of competition in the provision of local loop services." [13]

In this vein, Congress essentially codified the FCC's cross-ownership rules in Section 533(b) of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 47 U.S.C. 533(b). It indicated that the ban was intended "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets." [14]

The key factual predicate that prompted the ownership ban still exists today. Specifically, LECs continue to enjoy overwhelming local access market dominance. Nationwide, industry analysts reported last year that aggregate revenues for access services of all competitive local telephone access providers combined are less than one percent of total monopoly LEC access revenues and an even smaller percentage of total revenues.[15] Indeed, in California, local telephone companies retain a *de jure* monopoly [16] and are resisting efforts to open up the local exchange market to meaningful competition.[17]

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[12] *Id.* at 160.

[13] *Id.* at 177.

[14] H.R. Rep. No. 934, 98th Cong., 2d Sess. 56 (1984).

[15] Economics and Technology, Inc./Hatfield Associates, Inc., "The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers," at ii (February, 1994).

[16] See *In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers*, CAL. PUB. UTIL. Decision No. 89-10-031.

[17] See Comments of Pacific in *In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers*, CAL. PUB. UTIL. Investigation No. 87-11-033 (filed January 31, 1995).

The Ninth Circuit recently reaffirmed that "the BOCs have the incentive to discriminate [in the provision of enhanced services] and the ability to exploit their monopoly control over the local networks to frustrate regulators' attempts to prevent anticompetitive behavior." [18] This incentive to use network facilities to the detriment of competing video programmers and providers is especially strong in the context of LEC-provided video service because the LECs already have a wired connection into nearly every home. Thus, LECs are looking to provide video services to consumers who are their captives for telephony.

CCTA has had first-hand experience with telephone company attempts to exploit their extraordinary market power to gain a competitive advantage in the video services market. For example, in 1986, Pacific constructed a "leaseback" video transport cable system for an independent cable operator in Palo Alto, California, and estimated that the system's annual revenue for the first 15 years would recover its costs and yield a rate of return on Pacific's investment of between 10 and 12.72 percent.[19] Although Pacific's construction costs, in fact, had vastly exceeded its estimate, the company never increased its tariffed rates to the customer.[20] As a result, potential competitors were injured because Pacific required telephone ratepayers to bear the burden of its loss.

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[18] *California v. FCC*, 39 F.3d 919, 929 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995).

[19] Application of Pacific Bell for Authority Pursuant to Section 214 of the Communications Act of 1934, and Section 63.01 of the Commission's Rules and Regulations to Construct and Maintain Broadband Cable Distribution Facilities in and around the City of Palo Alto, CA, File No. W-P-C 5753 (filed April, 1986 and amended September, 1986).

[20] See Reply of the California Cable Television Association to Pacific Bell's Opposition to Petitions to Deny, FCC File Nos. W-P-C 6913, 6914, 6915, and 6916, at 39-42 (filed March 11, 1994).

Significantly, this conduct, which violated Pacific's tariff and the FCC's cross-ownership rules, was not prevented by the accounting "safeguards" imposed by the FCC.

Pacific's pending proposals to provide video dialtone service are even more striking.[21] Pacific claims that its $16 billion investment in a new hybrid fiber/coaxial cable telecommunications network is nothing more than a replacement of its copper telephone network and not intended primarily to give Pacific the ability to provide video programming.[22] Therefore, Pacific claims it needs no regulatory approval for most of its investment and has, in fact, initiated construction of its new network with no intervention by the FCC.[23]

On the basis that the $16 billion investment is primarily for the purpose of telephony, Pacific also proposes that its embedded monopoly telephone ratepayers bear the cost of its new video network. Specifically, Pacific proposes to scrap millions of copper wires, substitute broadband coaxial cable "drops", even for households that only want basic telephone service, build a broadband feeder and distribution system to carry both video and telephony, and then charge off 78 percent of the new network to regulated telephony services, when less than half of these costs should be borne by telephone ratepayers.[24] This massive

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[21] Applications of Pacific Bell for Authority Under Section 214(a) of the Communications Act to Construct Video Dialtone Facilities, File Nos. W-P-C- 6913, 6914, 6915, 6916 (filed December 20, 1993).

[22] *Id.*

[23] See Letter from Jeffrey Sinsheimer, Director of Regulatory Affairs, CCTA, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, FCC, at 12, FCC File Nos. W-P-C 6913, 6914, 6915, 6916, dated April 11, 1995, citing Letter from Alan Ciamporcero, Pacific Telesis, to Kathleen M.H. Wallman, FCC, at 8, dated January 13, 1995.

[24] See Letter from Jeffrey Sinsheimer, Director of Regulatory Affairs, CCTA, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, FCC, Exhibit 1 at 2 (Declaration of Leland L. Johnson, Ph.D.), FCC File Nos. W-P-C 6913, 6914, 6915, 6916, dated April 11, 1995.

cost-shifting away from video dialtone users will allow Pacific to underprice other video providers at the same time that it unfairly burdens its ratepayers.

Most significantly, Pacific's video dialtone proposals to provide common carriage service are nothing more than a Trojan Horse for the company's provision of video programming. Specifically, Pacific expects that its offering will be governed by common carrier regulations, although it proposes to grant discriminatory access and rates to a "favored" video programmer.[25] And, if the First Amendment questions before this Court are resolved in a manner that will permit the telephone company to provide video programming in its service area, Pacific intends to purchase this "favored" programmer.[26]

It is far from clear that the FCC possesses the means to police anticompetitive conduct of this sort in the absence of LEC ownership of video programming. It is readily apparent, however, that the agency will not be able to deter LECs from extending their telephone monopolies into the video transport market when they have the added incentive of gaining dominance over the lucrative video programming business. In light of this evidence, it is not apparent why the court of appeals believes that limiting "the telephone companies' editorial control over video programming to a fixed percentage of the channel's available" would be an effective "less-burdensome alternative" to Section 533(b).[27]

Finally, there is simply no evidence that this limited economic regulation has any impact whatsoever on the ability of LECs to get their desired messages to local subscribers. Section 533(b) allows telephone companies ample avenues for communication, including dissemina-

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[25] See Letter from Spencer Kaitz, President, CCTA, to Reed Hundt, Chairman, FCC, FCC File Nos. W-P-C 6913, 6914, 6915, 6916, dated September 19, 1994.

[26] *Id.*

[27] Pet. App. 41a.

tion of video programming by any means except LEC-owned in-region cable systems, as well as any expression that does not constitute video programming. In contrast to the minimal effect the cross-ownership ban has on telephone company speech, the regulation promotes competition and ensures that the LEC vision of just one (LEC-owned) wire into each home does not become a reality.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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